

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

|                                     |   |             |
|-------------------------------------|---|-------------|
| IN THE MATTER OF THE APPLICATION    | ) |             |
| FOR EXTENSION OF TIME TO PERFECT    | ) |             |
| CHANGED BENEFICIAL WATER USE PERMIT | ) | FINAL ORDER |
| NO. G025010-s40P GRANTED TO         | ) |             |
| GUIDO F. VAIRA AND LAVONNE A. VAIRA | ) |             |

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the October 3, 1989 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

Application for Extension of Time on Changed Beneficial Water Use Permit No. G025010-s40P by Guido F. and Lavonne A. Vaira is hereby approved. The deadline for completion of the Permit and Authorization as specified by this order, and filing of the Notice of Completion of Change of Appropriation Water Right (Form 618) shall be November 30, 1991. The Applicants are further ordered to submit a progress report of the work completed under this Authorization by November 30 of each year to the

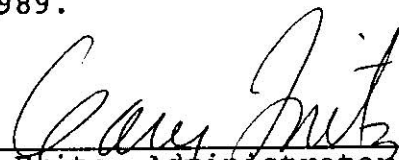
**CASE # 25010**

Glasgow Water Rights Field Office, P.O. Box 1269, Glasgow, MT  
59230.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 6 day of November, 1989.


  
\_\_\_\_\_  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 7<sup>th</sup> day of November, 1989, as follows:

Guido F. and Lavonne Vaira  
HC 87, Box 2070  
Richey, MT 59259

Roy Jones, Field Manager  
Glasgow Field Office  
P.O. Box 1269  
Glasgow, MT 59230

  
\_\_\_\_\_  
Irene V. LaBare  
Legal Secretary

BB

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

|                                     |   |                       |
|-------------------------------------|---|-----------------------|
| IN THE MATTER OF THE APPLICATION    | ) |                       |
| FOR EXTENSION OF TIME TO PERFECT    | ) | PROPOSAL FOR DECISION |
| CHANGED BENEFICIAL WATER USE PERMIT | ) |                       |
| NO. G025010-s40P GRANTED TO         | ) |                       |
| GUIDO F. VAIRA AND LAVONNE A. VAIRA | ) |                       |

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a contested case hearing in the above-entitled matter was held on July 11, 1989 in Sidney, Montana.

The Applicants, Guido F. Vaira and Lavonne A. Vaira, appeared pro se.

There were no objections to the original appropriation or to the Application for Extension; thus no objectors were represented at this hearing.

There were no witnesses from the Water Rights Bureau, Department of Natural Resources and Conservation (hereafter, "Department") at this hearing.

PRELIMINARY MATTERS

During the course of the hearing, the Hearing Examiner ordered that the record be left open for an additional ten days to allow the Applicants to submit documentation referred to in their testimony. This order was necessary to provide a complete record upon which a fair and equitable decision could be based.

**CASE # 25010**

### EXHIBITS

The Applicants offered into evidence two exhibits, to wit:

Applicants' Exhibit No. 1 consists of a letter to the Hearing Examiner from Kim Whipple, District Conservationist for the Soil Conservation Service (SCS), Sidney, Montana. The intent of the letter is to confirm that the SCS had looked at the Applicants' project and had provided design work for the project in recent years. However, the records pertaining to the project were lost and time is needed to re-establish a workable design.

Applicants' Exhibit No. 2 consists of a letter to the Hearing Examiner from Donald Pederson, County Supervisor for Farmers Home Administration (FmHA), Glendive, Montana. The intent of the letter is to confirm that FmHA has again considered the Applicants' proposed project and will be releasing funds to complete the project. The letter further supports testimony given at the hearing by the Applicant that because of the extended drought he was unable to fund this project with his own resources or secure financial assistance through FmHA since they would not allow any capital improvements during this drought cycle.

Applicants' Exhibits 1 and 2 were duly received into evidence prior to the Hearing Examiner's extended hearing closing date of July 21, 1989.

The Department file, containing the originals of the Application and the Application for Change, correspondence from the parties, Department processing documents, copies of the Notices of Action on Application for Extension of Time, the correspondence from the Department concerning the Permit and Authorization, was made available at the hearing for review by all parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

The Hearing Examiner having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

#### FINDINGS OF FACT

1. Section 85-2-402(7), MCA, provides:

The department or the legislature, if applicable, may approve a change subject to such terms, conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedure of 85-2-312(3).

Section 85-2-312(3), MCA, states, in relevant part:

The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the expiration date of

the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. The department may serve notice by first-class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party.

2. Permit to Appropriate Water No. 025010-s40P was issued to Guido and Lavonne Vaira on September 12, 1980 with a priority date of October 31, 1979. The Permit granted the Applicants the right to divert at a rate not to exceed 14 cubic feet per second and a volume of 225 acre-feet of water per year from Duplisse Creek, a tributary to East Redwater River. The Permit was granted for new irrigation purposes by water spreading from January 1 to May 30 inclusive, of each year, on 55 acres in the SW $\frac{1}{4}$  and 50 acres in the SE $\frac{1}{4}$  of Section 4, 35 acres in the NE $\frac{1}{4}$  and 10 acres in the NW $\frac{1}{4}$  of Section 9, Township 24 North, Range 52 East, M.P.M., Richland County, Montana, and containing a total of 150 acres.

Under the terms of Permit No. 025010-s40P, the Permittees were required to complete the diversion and distribution work and

apply the water to the specified beneficial use by October 1, 1982. The Permittees further were required to file the Notice of Completion of Permitted Water Development (Form No. 617) with the Department on or before December 1, 1982. (Department file)

3. Authorization to Change Appropriation Water Right No. G025010-s40P was filed on April 24, 1985, and issued to Guido and Lavonne Vaira on July 31, 1985. The Authorization granted the Applicants the right to add a point of diversion from the East Redwater River in the NW $\frac{1}{4}$  SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 4, Township 24 North, Range 52 East. Under the terms of this Authorization the Applicants were required to complete the authorized change and file the Notice of Completion of Change of Appropriation Water Right (Form 618) by December 1, 1986.

4. The Applicants requested and received three extensions of time in which to complete the permitted appropriation. Pursuant to the third (final) extension, granted November 17, 1986, the Applicants were required to complete the permitted beneficial use on or before September 30, 1988, and file a Notice of Completion of Water Development (Form No. 617) with the Department on or before November 30, 1988. (Department file)

The reasons given by the Applicants for requesting the first extension of time were insufficient funds, insufficient amount of time, and that previous SCS commitments precluded technical assistance needed to construct the project. The reason given by the Applicants for requesting the second extension of time was lack of funds. The reason given by the Applicants for requesting

the third extension of time was not having the finances to do the project this year. None of the extensions required the Applicants to file annual reports as a condition to the authorized extension. (Department file)

5. On November 29, 1988, the Department received a fourth Application for Extension of Time from the Applicants. In response to question number 3 on the Application, which requests the Applicants to "state below the reason(s) the project will not be completed as scheduled", the Applicants answered that, "Drought area - too dry to do work two years in a row also financial hardship. Restructuring through the FmHA." The Applicants requested an additional two years to complete the project. (Department file)

6. The pertinent portions of the Application for Extension of Time were published in the Sidney Herald, a newspaper of general circulation in the area of the source, on December 21, 1988. Additionally, the Department served notice by first-class mail on public agencies and individuals which the Department determined might be interested in or affected by the request for extension of time. (Department file)

7. The Department received no objections to the Applicants' Application for Extension of Time. However, the Department proposed to deny the Applicants' Application for Extension of Time to complete Authorization to Change No. G025010-s40P on March 9, 1989. The reason for the Department's proposed action stated, "Due diligence toward completion of irrigation project



has not been shown since the permit was granted on September 12, 1980, and the Authorization to Change on July 31, 1985, even though several previous Extensions of Time have been granted." (Department file)

8. The Applicants in a letter dated March 30, 1989, and received by the Department on April 4, 1989 requested a hearing on the Department's decision to deny an additional extension of time to complete Provisional Permit/Authorization to Change No. G025010-s40P. In this letter, the Applicants stated, "We have been under severe financial stress the last eight years but now have our debts restructured by FmHA. The money to complete this project has been budgeted for 1989 and 1990. This area has had severe droughts during the last few years and at one time the SCS personnel stated there was not enough subsoil moisture to properly do the construction. We have some subsoil moisture at this time." (Department file) Therefore, pursuant to Sections 85-2-402(7) and 85-2-312(3), MCA, the Department held a hearing on the Application.

9. The Applicants testified that technical and design expertise from the SCS has been used on this project. Soil samples were taken and a project design drawn up. However, these plans were lost or misplaced one and one-half years ago. The Applicants were told by SCS personnel that due to past drought conditions, the soil was too dry for adequate compaction and construction of water spreading dikes. The Applicants also testified that the SCS plans and specifications must be

redesigned prior to approval for SCS cost sharing of the project.

10. The Applicants testified that the extended drought of the 1980's has precluded funding and construction of this project. However, FmHA has restructured the Applicants' financial position and made a firm commitment to help finance this capital improvement to a sum of \$7,000.00 over the next two-year period. (Applicants' Exhibit No. 2)

11. The Applicants testified that they added a point of diversion to the project from East Redwater River in 1985. Water has not always been available from the original point of diversion on Duplisse Creek and East Redwater River was a more reliable water source during early spring runoff. The Applicants indicated this change helped the economic picture of the project.

12. When asked if they could complete the project within the time requested on the Extension, Applicants replied, "I think we can . . . We're gonna get her done." They further stated that they now have funds available to do the project both from FmHA and 50% cost sharing from the SCS up to another \$3,500.00.

13. A map within the file prepared by the Department dated November 30, 1988, verifies there are no junior appropriators five miles upstream or immediately downstream of the point of diversion on Duplisse Creek or five miles downstream on the East Redwater River who have perfected their permits and put water to beneficial use. (Department file)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter, and all the parties hereto.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner. See Findings of Fact 1, 5, 6, 7, and 8.

3. The holder of an Authorization to Change Appropriation Water Right is required to make a showing of good cause why the Authorization time limits should be extended before the Department can extend time limits specified in the Authorization for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. See Section 85-2-402(7) and Section 85-2-312(3), MCA.

4. The Montana Water Use Act has incorporated the requirement for proceeding with due diligence. A Permittee is entitled to a priority date as of the filing of his application, see Section 85-2-401(2), MCA; however, the Appropriator is entitled to retain his priority date only if the terms of the permit are met. These terms include the time limits for "commencement of the appropriation works, completion of construction, and actual application of the water to the proposed

beneficial use." See Section 85-2-312(2), MCA. The Montana Water Use Act clearly contemplates that the result of not meeting the time limits shall be loss or modification of the permit and its attendant priority date. See Section 85-2-314, MCA.

5. The Applicants have proceeded with due diligence to develop the appropriation right granted to them by Authorization No. G025010-s40P.

The Applicants, by their own testimony and by documentation from FmHA and the SCS, established that soils analysis was performed and plans and specifications were drawn up. The Applicants have obtained a firm commitment from FmHA to finance a project. However, drought conditions over the past eight years, specifically over the last two years, and the loss of the original plans one and one-half years ago have hampered completion of the project. See Findings of Fact 9 and 10.

The Applicants established that the Authorization for Change in 1985 to a more reliable source of water, as well as financial restructuring through FmHA, has made the project more economically feasible. See Findings of Fact 10 and 11.

6. In the present matter, the Applicants have made an attempt to begin the proposed project. The basis for their failure to act over the last period is the drought which prevented adequate construction and compaction of the water spreading system dikes, and the loss of the original project plans and specifications drawn up by the SCS prevented cost sharing and construction of the project. In consideration of the

time period since the granting of the Authorization to Change in 1985 and the basis for the Applicants' failure to complete the project, there is good cause for granting an Extension of Time. (See Findings of Fact 13.)

The Applicants have shown by preponderance of evidence in the record that they have been unable to perfect the Authorization due to physical factors beyond their control. The Applicants have shown good cause (due diligence) of why an Extension of Time should be granted on Authorization to Change Appropriation Water Right No. G025010-s40P.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

#### PROPOSED ORDER

Application for Extension of Time on Changed Beneficial Water Use Permit No. G025010-s40P by Guido F. and Lavonne A. Vaira is hereby approved. The deadline for completion of the Permit and Authorization as specified by this order, and filing of the Notice of Completion of Change of Appropriation Water Right (Form 618) shall be November 30, 1991. The Applicants are further ordered to submit a progress report of the work completed under this Authorization by November 30 of each year to the Glasgow Water Rights Field Office, P.O. Box 1269, Glasgow, MT 59230.

#### NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to carefully review the proposed order.

Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Avenue, Helena, Montana, 59620-2301); the exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. See Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. See Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 3<sup>rd</sup> day of October, 1989.

*Bob L. Larson, Hearing Examiner*  
Bob L. Larson, Hearing Examiner  
Department of Natural Resources  
and Conservation  
P.O. Box 1828  
Havre, MT 59501  
(406) 265-5516

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 3<sup>rd</sup> day of October, 1989, as follows:

Guido F. and Lavonne Vaira  
HC 87, Box 2070  
Richey, MT 59259

Roy Jones, Field Manager  
Glasgow Field Office  
P.O. Box 1269  
Glasgow, MT 59230

*Irene V. LaBare*  
Irene V. LaBare  
Legal Secretary